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ABSTRACT

Guidelines for the development of policies and procedures concerning copyrights at colleges and universities are presented. Emphasis is placed on a general statement on institutional policies, scope of the copyright, materials subject to copyright, statement of institutional copyright policy, definition of copyrightable materials, determination of rights to copyrightable materials, determination of equities, and administrative procedures governing copyrightable materials. A nine-item bibliography is included. (MJM)

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COPYRIGHTS AT COLLEGES AND UNIVERSITIES

Guidelines
for the Development
Of Policies and Procedures

U.S. DEPARTMENT OF HEALTH
EDUCATION & WELFARE
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EDUCATION

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COMMITTEE ON GOVERNMENTAL RELATIONS
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1972

A NOTE ON THESE GUIDELINES

The accompanying paper was prepared by the Subcommittee on Patents, Copyrights, and Rights in Data of the Committee on Governmental Relations to assist colleges and universities in developing their own policies and procedures in the copyright field. The subcommittee initiated the project because of its strong conviction that all colleges and universities, as major producers of copyrightable materials, should be giving increasing attention to copyright policy, both in fairness to themselves and with appropriate regard for the rights of the creative members of their academic communities.

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INTRODUCTION

Colleges and universities are caught up today in a communications revolution involving the expanding use of a wide variety of new and developing media in the teaching-learning processes and in the communication of knowledge. Despite their growing involvement in a broad and complex spectrum of copyright problems, few institutions have adequate statements of copyright policies and procedures. The academic community traditionally has been most protective of the rights of authors—literary, dramatic, musical, artistic, and other intellectual works. These works, when published, may be protected by copyright or, when unpublished, by common law.

Colleges and universities are becoming increasingly involved in the use of new media that generate or draw upon a wide variety of materials that may be protected by copyrights. These include films, TV programs, cassettes, programmed learning, computer-assisted instruction, and computer programs. The generation of such materials is more often than not a joint enterprise involving the ideas and talents of individual faculty, the use of institutional facilities and equipment, and in many instances some degree of financial support from the institution and/or an outside sponsor. As both a generator and a user of these copyrightable materials,

a university may expect problems centering on such issues² as academic freedom, faculty rights, faculty accountability, release time, teaching credit, sponsor requirements, and the determination of rights to copyrightable materials. The dollar potential of royalties from some copyrightable materials can be significant.

The sponsor supporting a program generating copyrightable material may stipulate specific conditions with respect to copyrights and royalty income. The U. S. Office of Education, in outlining its copyright policies in its booklet, *Copyright Program Information*, 1971, made the following statement: "Universities particularly should establish written policies setting forth the respective rights of the university and its staff members in anticipated copyright royalties."

The changes that are forecast in the nature, content, and methods of higher education for the coming decade are certain to bring about even greater and more diverse use of new media for communication and learning. New curricula and course materials will be developed to exploit these media. Universities will be faced with increasingly complex problems relating to copyrights and royalties. To protect the rights of the individual and the institution, it will be important that colleges and universities develop well conceived policies and procedures to govern the determination of rights to copyrightable materials.

I General Statement on Institutional Policies

Colleges and universities recognize and encourage the publication of scholarly works as an inherent part of the educational mission. They also acknowledge the privilege of university personnel (faculty, staff, and students) to prepare, through individual initiative, articles, pamphlets, and books that may be copyrighted by and generate royalty income for the author. The variety and number of copyrightable materials that may be created in a university community have increased significantly in recent years as have the author-university-sponsor relationships under which such materials are produced. Many institutions have well defined patent policies and procedures, but few have adequate formal policies governing copyrights.

In codifying policy and procedure with respect to copyrights a university should consider the following elements:

- a. Statement of institutional policies on copyrightable materials.
- b. Definition of copyrightable materials.
- c. Determination of rights to copyrightable materials.
- d. Determination of equities.
- e. Administrative procedures governing copyrightable materials.

Most universities will find that copyrightable materials pose different policy and procedural problems than

inventions, so that separate policies and procedures should normally be adopted for copyrights and for patents. University policies and procedures adopted for copyrightable materials should be cognizant of established institutional practices with respect to the ownership and disposition of inventions. Care should be taken to coordinate the patent requirements and the copyright and publication requirements which may have been previously issued by certain sponsoring agencies.

II Scope of the Copyright

Statutory copyright is based on laws enacted by Congress. The Constitution of the United States gives Congress the power to enact laws relating to copyrights, Article I, Section 8, saying, "Congress shall have power . . . to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." Under this power Congress has from time to time enacted various laws relating to copyrights.

A work must be original to be copyrightable; it is not necessary that it be novel as is the case with an invention. The copyright goes to the form of expression rather than to the subject matter of the writing. A description of a machine could be copyrighted as a writing, but this would only prevent others from copying the description—it would not prevent others from writing a description of their own or from making and using the machine.

A statutory copyright protects authors of various kinds of work defined in the law and listed in the bulletins of the Copyright Office by granting them exclusive publication rights to reproduce, publish, distribute, or sell their works for a specified period of time. Copyright protection can be claimed only by the author or those authorized by him to assert this right. Works produced by an individual employed for their production are normally copyrightable by the employer and not by the author-employee. A copyright may be registered by submission of an application for registration to the Copyright Office. A copyright may be assigned, transferred, limited, or licensed by a written agreement signed by the author or the owner of the copyright. If the original text of a work is in the public domain or dedicated to the

public, it cannot be copyrighted: the right to secure copyright is lost, at the time of publication, i.e., the date on which copies are first placed on sale, sold, or publicly distributed, if an adequate notice of copyright is not on the work at that time.

The present legislation (U. S. Code, Title 17, Section 24) provides statutory copyright protection for a period of twenty-eight years from the date of first publication. A copyright may be renewed and extended upon application to the Copyright Office. Congress is currently (1971) considering revision of the copyright laws.

Property rights in copyrightable material (and the right to register under the statute) may be secured for a published work by initially publishing the work in printed or otherwise processed form bearing a proper copyright notice. A publication in order to obtain statutory copyright must contain the notice as prescribed in the statute, and when this occurs the copyright is accordingly protected by the statute. A formal registration in the Copyright Office constitutes further evidence of the copyright, but an author who fails to put a copyright notice on his work before making a general distribution (but not a limited distribution) of it has lost the right absolutely even though he may thereafter try to obtain a copyright registration. Under certain conditions copyrights on some unpublished works may be registered by filing the appropriate application form and depositing one complete copy with the Copyright Office. Unpublished books and similar works are not included in this category. The various forms for registering copyrightable material of several media may be obtained from the Register of Copyrights, U. S. Copyright Office, Washington, D. C. 20025.

Under common law, as contrasted with statutory law, copyrightable material which is not placed on sale, sold, or publicly distributed is the sole property of the author and may not be reproduced or used without his permission. The common law copyright, however, is a tenuous safeguard and is effective only so long as the author keeps the manuscript unto himself. Otherwise the risk of inadvertent publication without notice and hence dedication to the public may become a reality. He may, however, disclose it to a limited number of people or use it in a small class and effectively limit its circulation. Such "limited publication" should include

an appropriate notation that the material is being shown or distributed for limited purposes to a limited group only. But a general unrestricted distribution of the material without a copyright notice will lose the common law copyright, as well as preclude the obtaining of the statutory copyright, for it constitutes a dedication to the public.

III Materials Subject to Copyright

The following types of material now or in the near future may be subject to copyright:

1. Books, journal articles, texts, glossaries, bibliographies, study guides, laboratory manuals, syllabi, tests, and proposals.
2. Lectures, musical or dramatic compositions, and unpublished scripts.
3. Films, film strips, charts, transparencies, and other visual aids.
4. Video and audio tapes and cassettes.
5. Live video or radio broadcasts.
6. Programmed instruction materials.
7. Computer programs.
8. Other materials.

Although copyright law does not specifically mention computer programs, the U. S. Copyright Office has recognized since 1964 that computer programs are copyrightable, and numerous programs have been copyrighted. It should be noted that certain computer programs meeting the criteria for an invention may be patentable.

IV Statement of University Copyright Policy

An institution seeking to clarify its position on the rights to and disposition of copyrightable material should develop a statement of copyright policy. This statement should be broad; it should be brief. Administrative procedures should be separate and apart from the policy statement.

The statement may acknowledge the privilege of university personnel (faculty, staff, and students) on their own individual initiative to write or otherwise generate copyrightable materials to which they have the sole rights of ownership and disposition. The statement may also cover the disposition of rights to those materials

generated with significant use of university facilities and resources or as a result of assigned university duties or with support by a third-party sponsor. A general statement on royalty participation may be a part of the policy. The administrative body responsible for interpretation and administration of the copyright policy may be set forth.

V Definition of Copyrightable Materials

An institution, as a guide to faculty, staff, and students, should define the types of copyrightable material covered by the copyright policy and interpret the provisions that apply to certain kinds of copyrightable materials. A list of types of materials is given earlier in these guidelines under *Materials Subject to Copyright*.

VI Determination of Rights to Copyrightable Material

To determine the disposition of rights to copyrightable materials developed by university personnel it may be helpful to assess these materials within the framework of the following four categories:

1. Individual Effort

Rights to copyrightable material generated as a result of individual initiative, not as a specific university assignment and only incidental use of university facilities or resources, should normally reside with the author.

2. University-Assisted Individual Effort

Where the university provides partial support of an individual effort resulting in copyrightable material by contributing significant faculty time, facilities, or university resources it is reasonable to consider joint rights to ownership and disposition of these materials and a sharing of royalty income. Some universities may find it desirable in the interest of simplification to merge this category with category 1 above.

3. University-Supported Efforts

Ownership of copyrightable material developed as a result of assigned university duty may reside with the university, although some sharing of royalty income

with the author may be appropriate in certain instances.

4. *Sponsor-Supported Efforts*

The grant or contract under which copyrightable materials are generated may contain specific provisions with respect to the disposition of rights in these materials. These provisions merit attention at the time the agreement is negotiated. Persons who may produce copyrightable materials under sponsor-supported projects should clearly understand their rights and obligations and, if so indicated, their agreement should be obtained before the institution enters into the contract or grant. Similarly, the appropriate terms and conditions should be brought to their attention when the work is initiated. Generally, the agreement between the sponsor and the university will vest title to copyrightable materials in the university, with the sponsor retaining a royalty-free license for the sponsor's own usage. In other circumstances the agreement may specify that the materials be placed in the public domain,⁷ may assign all rights to the university, or the sponsor may retain all rights. Even in the exceptional situation where the sponsor retains all rights, sharing of royalty income between the sponsor and the university may be appropriate, particularly when the project involves institutional cost sharing. The nature and extent of author participation in royalty income derived by the university from copyrighted materials generated on sponsored programs may be subject to sponsor regulations.

The author, university, and sponsor normally relinquish rights to copyright articles submitted to scholarly and professional journals, many of which are copyrighted. Advance arrangements should be made with the publisher if the author, university, or sponsor is to retain title or other rights to the copyright on the material submitted.

It is desirable to define in advance the disposition of rights to those copyrightable materials to be generated through university- or sponsor-supported efforts. The

⁷Such a requirement is normally undesirable from the standpoint of the sponsor, the institution, and the author.

disposition of rights to materials developed through partially university-assisted individual efforts may prove more difficult to determine, particularly in advance.

VII Determination of Equities

The determination of the nature and extent of participation in income resulting from royalties or assignment of copyrighted materials will follow in a general way the four categories of ownership described earlier.

Income derived from materials resulting from the individual initiative of college or university personnel should normally accrue to the author alone. However, when these individual efforts are significantly assisted by the use of university facilities or resources, institutional policy may stipulate some degree of income sharing between the author and the university.

In those instances where copyrighted materials are generated as a result of assigned university duty, institutional policy may specify that the university is the sole recipient of the derived income. Some institutions have a royalty-sharing policy on patents. An institution may in a similar manner adopt a policy that provides for the crediting of part or all of the royalty from copyrightable materials to the authors and/or their academic departments. In some instances the institution may elect to leave copyrights with the author, even though the university has supported the work that generated the copyrightable materials.

If the development of the copyrighted materials has been supported by a sponsor, the university and the author are obligated to adhere to the conditions of the grant or contract as stipulated by the agreement. Income derived from copyrighted materials will be handled in accordance with institutional policies unless special contractual or grant requirements prevail. In those cases where the sponsor may require the return of part of the income derived from sale of sponsor-supported materials which are copyrighted, institutional cost sharing should be considered together with other factors in determining the distribution of such royalty income. If the institution receives all or part of the income derived from the sale of such sponsor-supported materials, this income normally would be handled in accordance with established

institutional policies unless special sponsor requirements prevail.

In determining university policy on the disposition of royalty income it may be desirable to consider earmarking a portion of the derived income to be held in reserve to defray costs of future revisions or for implementation of the adoption of the copyrighted materials.

It is imperative that royalty income aspects of university-supported or sponsor-supported projects leading to copyrightable materials be examined thoroughly at the outset of the project and that a clear and mutually satisfactory understanding as to the disposition of copyrights and royalty income be reached between the author, university, and sponsor.

VIII Administrative Procedures Governing Copyrightable Materials

In adopting an institutional policy, a university may benefit from developing well-defined and codified procedures for the governance of copyrightable materials developed by its personnel. The president of the university, or more generally some appropriately designated authority, will normally have the ultimate responsibility for decisions on copyright matters. It usually will prove advantageous to delegate responsibility and authority on copyright matters to an appropriate administrator. This individual might be the institution's legal counsel, a vice president for research, the dean of the faculty, or other university administrator. The statement of policies and procedures should define clearly the responsibilities and authority of the university copyright administrator. These duties may include providing advice, assistance, guidance in obtaining a publisher, and other related services to university personnel on copyright matters.

Adopted procedures should provide for the copyright administrator in conference with the author and other concerned parties to arrive at a mutually acceptable copyright agreement within the provisions of university policy. One mechanism for negotiation of copyright matters is to use a three-man panel consisting of the author or his representative, the university copyright officer, and a third member agreed to by the first two. Alternatively, a copyright advisory committee may

prove helpful in evaluating ownership, disposition, and the distribution of royalty income relating to copyrightable materials. Whatever the procedure for administering copyright matters, there should be specific provisions for appeal.

The university procedures may provide for prior review of all programs expected to generate copyrightable materials with full or significant partial support by the university or a sponsor in order that an advance determination can be made wherever possible with respect to rights, disposition, and income distribution. This review would normally be accomplished by the intended authors, the copyright officer, and others as may be designated by university policy. A mutually acceptable advance agreement covering the determination of rights, disposition, and income distribution may be an important part of the project file for those projects producing copyrightable materials with partial or total support by the university or a sponsor. The advance agreement may be subject to revision as the project progresses.

Alternatively, an institution may find it desirable to request an annual report from its personnel (faculty and staff) on all copyrightable material generated during the reporting period. Those materials developed with partial or full university or sponsor support could be reviewed by the copyright officer and others designated by university procedures to make recommendations on the disposition of rights to copyrightable material and income participation.

If a university adopts specific policies and procedures relative to the rights, disposition, and income distribution relating to copyrightable materials, it may be desirable to incorporate reference to these provisions in employment contracts in cases where such contracts are used.

Faculty and staff participation in the formulation of institutional copyright policies and procedures is desirable. It may also be considered desirable to have faculty and staff involved in the governance of copyright matters to assure that the policies and procedures are equitable and workable. The nature and extent of student participation in copyright policies and procedures may vary with the institution and the policy of the institution with respect to copyrightable materials generated by students.

In designing and implementing institutional policies and procedures for copyrightable materials, extreme care must be taken to protect the initiative and rights of individuals. Similarly, consideration should be given to those cases where the copyrightable work is the result of a group effort. These same policies and procedures should reasonably assure the requisite control and accountability by the university for resources allocated to partial or complete support of university personnel engaged in producing copyrightable materials.

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